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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE GILBERT CORTEZ,

Defendant and Appellant.

H046237

(Santa Clara County  
Super. Ct. No. C1779305)

Defendant Jesse Gilbert Cortez appeals following his plea of no contest to second degree robbery (Penal Code,<sup>1</sup> §§ 211-212.5, subd. (c)); false imprisonment (§§ 236-237); and possession of drug paraphernalia (Health & Saf. Code, § 11364). The trial court sentenced Cortez to 15 years in state prison, which included two five-year terms as enhancements for his prior serious felony convictions (§ 667, subd. (a)).

On appeal, Cortez asserts that the matter should be remanded to the trial court for resentencing in light of the recent amendments to sections 667, subdivision (a) and 1385, subdivision (b), by Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1-2) (Senate Bill 1393), which grant the court discretion to strike serious felony convictions in the interest of justice. The Attorney General concedes that a limited remand is appropriate for this purpose.

We agree, and reverse and remand the matter for resentencing.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code

## I. STATEMENT OF THE FACTS AND CASE

The trial court summarized the underlying facts of this case as follows: “Briefly, this incident occurred on November 25, 2017. [Cortez] and another suspect entered the Valero gas station. The other suspect placed a gun at the side of the victim while [Cortez] held a knife. The victim was ordered into the bathroom and his wallet was taken. Shortly thereafter[,] the victim was removed from the bathroom and ordered to open the safe. \$400 was stolen as well as the victim’s phone . . . . [T]he victim was placed back into the bathroom and [Cortez] and other suspect fled.

“Later, [Cortez] was stopped and searched and many items connected to the [section] 211 were discovered; however, at that time law enforcement allowed [Cortez] to go on his way. Subsequently[,] on November 27[,] the victim was interviewed and law enforcement determined that [Cortez] was involved and on December 10, 2017[,] he was arrested for the present offenses.”

On December 18, 2017, a complaint was filed charging Cortez with robbery in the second degree (§§ 211-212.5, subd. (c); count 1); false imprisonment (§§ 236-237; count 2); and possession of drug paraphernalia (Health & Saf. Code, § 11364; count 3). The complaint alleged with respect to counts one and two that Cortez personally used a deadly and dangerous weapon, a knife, during commission of the crimes (§ 12022, subd. (b)(1).) The complaint further alleged that Cortez had two prior felony strike convictions (§§ 667, subds. (b)-(i), 1170.12), and two prior serious felony convictions (§ 667, subd. (a)).

On June 26, 2018, Cortez pleaded no contest to all of the charges and admitted all of the allegations. On August 14, 2018, the trial court granted Cortez’s *Romero*<sup>2</sup> motion, and dismissed the prior strike convictions. The court sentenced appellant to 15 years in state prison as follows: five years for second degree robbery (§§ 211-212.5, subd. (c);

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<sup>2</sup> *People v. Romero* (1996) 13 Cal.4th 497.

count 1), plus an additional five years for each of the two prior serious felony convictions (§ 667, subd. (a)), to run consecutive. The court also imposed three years, six months for false imprisonment (§§ 236-237; count 2); and possession of drug paraphernalia (Health & Saf. Code, § 11364; count 3), to run concurrent to the 15-year term. The court stayed sentence on the personal use allegations (§ 12022, subd. (b)(1).)

On August 27, 2018, Cortez filed a timely notice of appeal. Cortez filed an amended notice of appeal on October 4, 2018, and the trial court issued a certificate of probable cause on October 29, 2018.

## **II. DISCUSSION**

As part of his plea, Cortez admitted that he had suffered two prior serious felony convictions, and the trial court imposed two consecutive five-year terms under section 667, subdivision (a)(1), as it was statutorily required to do at the time of his sentencing in 2018. However, on September 30, 2018, after Cortez entered his plea, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Cortez argues, and the Attorney General agrees, that the amendments to the law apply retroactively to his case, and the matter must be remanded for the trial court to exercise its discretion in determining whether to strike his serious felony enhancements.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) Thus, “[t]he *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend

as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (*People v. Conley* (2016) 63 Cal.4th 646, 657.) “The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

Nothing in Senate Bill 1393 suggests any legislative intent that the amendments only apply prospectively. Accordingly, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.)

Cortez is entitled to have the trial court exercise its “ ‘informed discretion’ ” in imposing sentence. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) “ ‘A court [that] is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. [Citation.]’ In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*Ibid.*)

The record before us does not clearly indicate that the trial court would have declined to strike Cortez’s prior serious felony conviction for sentencing purposes if it had the discretion to do so. Accordingly, remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike Cortez’s prior serious felony convictions.

### **III. DISPOSITION**

The judgment is reversed, and the matter is remanded to the superior court with directions to resentence Cortez in light of sections 667 subdivision (a) and 1385 subdivision (b), as amended by Senate Bill 1393.

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Greenwood, P.J.

WE CONCUR:

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Premo, J.

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Elia, J.

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